CRIMINAL YEAR SEMINAR

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EVIDENCE UPDATE

Presented By:

The Honorable Crane McClennen
Retired Judge of the Maricopa County Superior Court

&

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ARIZONA EVIDENCE
2018 Criminal Year Seminar

Rule 103(a) — Preserving a Claim of Error

- **103.a.160** Once the trial court has ruled against a party on an objection or offer of proof, the party may change its strategy without waiving the right to challenge the ruling on appeal.
- ***State v. Richter,*** 243 Ariz. 131, 402 P.3d 1016, ¶ 30 (Ct. App. 2017) (defendant was convicted of kidnapping and child abuse; defendant contended that, once trial court precluded her duress defense, it effectively prohibited any defense other than denial that abuse and kidnapping occurred, thus she did not waive challenge to trial court's ruling prohibiting duress defense).

State v. James, 242 Ariz. 126, 393 P.3d 467 (Ct. App. 2017) (Div. Two)

- Defendant was charged with child molestation and sexual conduct with minor with T.H. (his step-granddaughter) alleged to have occurred on same occasion between 2002 and 2007 when T.H. was between 6 and 10.
- State sought to admit other acts by Defendant with T.H. alleged to have occurred prior to 2006.
- State sought to admit other acts by Defendant with A.H. (Defendant's step-daughter and T.H.'s mother) when she was a child between 7 and 16 in the 1980's and which resulted in a guilty plea to attempted sexual abuse.
- Admission sought under Rule 404(c).

Rule 404(b) Other crimes, wrongs, or acts.

- Except as provided in Rule 404(c),
- evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.
- It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(c) Character evidence in sexual misconduct cases.

- In a criminal case in which a defendant is charged with having committed a sexual offense, . . .
- evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.

- When T.H. asked why he had acted this way, James explained he was sexually attracted to young girls and he found it difficult to control his impulses around them. He acknowledged he had been similarly attracted to T.H.'s mother when she was a child, and, as a result, he had been convicted as a sex offender for "messing around" with her.
- ***James*** at ¶ 8.

- **Rule 404(b)**
- Adopted from Federal Rules of Evidence
- Federal precedent is particularly persuasive given that Arizona courts have expressly sought to conform Arizona's evidentiary rules to the federal rules

- **Rule 404(c)**
- Promulgated by Arizona Supreme Court
- Arizona free to follow its own interpretation

- James contended that, for the contested Rule 404(c) evidence, the trial court must determine, by clear and convincing evidence, that he committed the other acts, and must do so at a pre-trial hearing based on live witness testimony or former witness testimony, subject to cross-examination, with a sufficient record to permit effective appellate review.
- ***James*** at ¶ 10.

Huddleston v. United States, 485 U.S.681, 688–90 (1988):

- Petitioner's reading of Rule 404(b) as mandating a preliminary finding by the trial court that the act in question occurred not only superimposes a level of judicial oversight that is nowhere apparent from the language of that provision, but it is simply inconsistent with the legislative history behind Rule 404(b).
- We conclude that a preliminary finding by the court that the Government has proved the act by [clear and convincing] evidence is not called for under Rule 104(a).
- In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by [clear and convincing] evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by [clear and convincing] evidence.

Rule 404(c)(1)(A):

- (1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:
- (A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

Rule404(c)(1)(A)—Character evidence in sexual misconduct cases—Sufficiency of evidence.

- **404.c.1.A.cr.015** Before admitting evidence of another act in a sexual misconduct case, the trial court must determine, by clear and convincing evidence, that the defendant committed the other act.
- ***James*** at ¶¶ 10–17: Court refused to follow *Huddleston* because "the Arizona Supreme Court has deliberately departed from the federal rules in this respect."
- ***State v. Aguilar,*** 209 Ariz. 40, 97 P.3d 865 (1997).
- ***State v. LeBrun,*** 222 Ariz. 183, 213 P.3d 332 (Ct. App. 2009).

- **404.c.1.A.cr.020** If there are conflicting versions of the other act evidence, the trial court must make a credibility determination in assessing whether the evidence is sufficient to permit the trier-of-fact to find that the defendant committed the other act.
- **404.c.1.A.cr.030** In determining whether the evidence is sufficient to permit the trier-of-fact to find that the defendant committed the other act, an evidentiary hearing is necessary only if a material factual dispute exists in the record that would necessitate the presentation of additional evidence.
- ***James*** at ¶¶ 18–24: Because in confrontation call defendant admitted to licking and touching victim and admitted to criminal activity with victim's mother that had resulted in his conviction as sex offender, record supported both women's allegations, thus trial court did not err in not holding pre-trial hearing.

- **404.b.cr.230 Extrinsic** evidence of another crime, wrong, or act is admissible if it is relevant to show **intent**, but intent is only an issue when the defendant acknowledges doing the act, but denies having the intent the statute requires, thus a blanket denial of criminal conduct does not put intent in issue.
- ***State v. Scott,*** 243 Ariz. 183, 403 P.3d 595, ¶¶ 13–16 (Ct. App. 2017) (because defendant claimed sex was consensual, defendant placed his intent in issue, thus trial court properly admitted evidence of defendant's past (Penn.) conviction for aggravated indecent assault).

State v. Escalante-Orozco, 241 Ariz. 254, 386 P.3d 798 (2017).

- In March 2001, **Escalante-Orozco** was employed as a live-in maintenance worker at a Phoenix apartment complex. On March 9, he installed flooring in the apartment that victim **Maria R.** shared with her 3-year-old son. **Maria's** body was found the next morning face down in her bathtub with her nightshirt bunched around her neck. She had been beaten, sexually assaulted, and stabbed until she bled to death. **Maria's** young son was wandering unharmed in the apartment. **Escalante-Orozco** sold his car and immediately left for Mexico without informing apartment management. Six years later, federal agents detained him in Idaho and notified Phoenix Police. He told Phoenix Police officers that he drank two beers on the night of the murder and then "everything went blank" until he found himself lying on **Maria** in her hallway with his hand on her "private part." He denied assaulting or killing **Maria** and suggested he had been drugged and set up by relatives who were angry with him.

Escalante-Orozco argues that the trial court incorrectly precluded evidence that **Armando Gabriel Lopez-Garduno, Maria's** boyfriend, assaulted and killed **Maria.**

- **Escalante-Orozco** sought to elicit testimony from **Lopez-Garduno's** wife, **Blanca Cisneros,** that her husband was a mean drunk, resisted efforts to get help for alcoholism, lied about attending Alcoholics Anonymous, hit her on two occasions, and that their relationship deteriorated because of his drinking.
- **401.cr.120** For evidence of third-party culpability to be relevant, it must tend to create a reasonable doubt about the defendant's guilt; if evidence shows that another person had the motive and opportunity to commit the crime, this would tend to create a reasonable doubt about the defendant's guilt, which would make the evidence relevant and the trial court should admit it, but may exclude it under Rule 403.
- ***Escalante-Orozco*** at ¶¶ 68–69: Because this testimony had nothing to do with relationship between **Lopez-Garduno** and **Maria,** it did not create reasonable doubt about defendant's guilt, thus trial court properly excluded it under Rule 401 and 403.

- **Escalante-Orozco** sought to introduce evidence that, the night before Maria's murder, a Hispanic man purportedly peeked through the blinds at another apartment in Maria's complex and threatened to kill a woman inside. He contends the evidence tended to create a reasonable doubt about his guilt and was therefore relevant and admissible because (1) the apartment was located on the ground floor of a building directly behind Maria's building; (2) Maria's front-window screen had been removed and the window was open when her body was found; and (3) **Lopez-Garduno** was Hispanic.
- ***Escalante-Orozco*** at ¶¶ 73–75: **Escalante-Orozco** never disclosed a defense that someone other than **Lopez-Garduno** was the perpetrator; his defense was **Lopez-Garduno** committed the crimes in the course of his relationship with **Maria,** not that he randomly committed such acts against women, and nothing tied **Lopez-Garduno** to the crime committed against the other woman.

- **Lopez-Garduno** could not be located at the time of trial, so the trial court permitted **Escalante-Orozco** to introduce **Lopez-Garduno's** statements to police that he and **Maria** had fought several days before her death and that he had been "bad" to **Blanca,** his wife, but limited this to the issue whether the police conducted a thorough investigation. **Escalante-Orozco** contended the statements were admissible without limitation because they were either not hearsay or admissible as a hearsay exception.
- ***Escalante-Orozco*** at ¶¶ 70–71: Rule 801(d)(2)(A) did not apply because **Lopez-Garduno** was not a party; Rule 804(b)(3) did not apply because the statements were vague and did not implicate criminal behavior; and Rule 807did not apply because **Lopez-Garduno's** statements did not have "equivalent circumstantial guarantees of trustworthiness" as established hearsay exceptions.

- **Escalante-Orozco** sought to introduce evidence from **Rocio Ugalde** that **Maria** told her that **Lopez-Garduno** (1) bruised her arm and that (2) was violent with **Blanca,** his wife. **Escalante-Orozco** argued that **Maria's** statements were "at least as reliable" as (1) a statement against interest under Rule 804(b)(3), (2) a statement by an opposing party under Rule 801(d)(2)), (3) a statement of then-existing mental, emotional, or physical condition under Rule 803(3), or (4) a statement for medical diagnosis or treatment under Rule 803(4).
- ***Escalante-Orozco*** at ¶¶ 63–65: Trial court properly excluded this evidence because (1) neither statement by **Maria** was against her interest, (2) **Maria** was not an opposing party, and (3 & 4) without knowing the circumstances under which **Maria** made this statement, court could not discern whether it had similar indicia of reliability,

- **Escalante-Orozco** did not object at trial, but claimed on appeal trial court should not have admitted six crime scene and 19 autopsy photographs.
- ***Escalante-Orozco*** at ¶¶ 83–87: Medical examiner used each of 19 autopsy photographs to explain different aspect of his testimony; detective used six crime scene photographs to show how victim was dragged into bathtub; photographs were not unduly gruesome and were not needlessly cumulative.
- ***State v. Rushing,*** 243 Ariz. 212, 404 P.3d 240, ¶¶ 24–31 (2017) (in murder prosecution, medical examiner used autopsy photographs to explain victim's injuries and to testify about cause of death; court stated "[c]ause of death is always relevant" and that photographs were also relevant to show premeditation; court stated that, although photographs were graphic, trial court acted within its discretion by finding their probative value was not outweighed by any prejudicial effect).

- **Escalante-Orozco** contended trial court should not have admitted testimony from his supervisor that, day before **Maria's** murder, **Escalante-Orozco** was not speaking to **Maria** in a "normal tone," and that **Maria** gave supervisor a "funny look" that he interpreted as her requesting that he get **Escalante-Orozco** to leave, which he did, and that later that day, **Escalante-Orozco** seemed "agitated," "wasn't himself," and "kept looking up" at victim's apartment.
- **404.b.cr.250 Extrinsic** evidence of another crime, wrong, or act is admissible if it is relevant to show **motive**.
- ***Escalante-Orozco*** at ¶¶ 76–81: Court court noted that, "when the existence of premeditation is in issue, evidence of previous quarrels or difficulties between the accused and the victim is admissible," and that this showed a motive for killing victim, and further held this evidence would not suggest a decision based on improper basis, such as emotion, sympathy, or horror).

- On cross-examination by defense counsel, **Cecilia Banda, Escalante-Orozco's** wife, testified **Maria** came by the couple's apartment once when both were home, and when asked if she noticed that **Escalante-Orozco** looked at **Maria, Cecilia** answered, "[h]e looked at a lot of them"; when asked to clarify this answer on redirect, **Cecilia** replied, "[h]e's one of those kind of people that was like a flirt, I don't know how to explain it." **Escalante-Orozco** argued for the first time that **Cecilia's** testimony was inadmissible character evidence under Rule 404(a).
- **103.a.203** A party may not complain about evidence the party itself had admitted or used.
- ***Escalante-Orozco*** at ¶¶ 82–83: Because Escalante-Orozco used evidence that he was a "flirt" to argue that his "flirtations" with **Maria** caused **Lopez-Garduno** to be jealous of her and kill her, defendant could not claim he was prejudiced by that evidence.

- **Escalante-Orozco** contended trial court should not have admitted DNA evidence. The Crime Lab analyst obtained a mixed Y–STR profile from sperm on **Maria's** nightshirt, with the major part matching an unknown male and the minor part "matching" **Escalante-Orozco's** DNA profile at five loci, and testified that the same Y–STR profile would be expected in all **Escalante-Orozco's** paternal relatives and in 1 in 34 southwestern Hispanics.

- **702.a.010** A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
- ***Escalante-Orozco*** at ¶¶ 56–58: Court noted requirement that evidence be "helpful" to jurors "goes primarily to relevance," and held Y–STR results were helpful to jurors.

- **702.c.010** A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the testimony is the product of reliable principles and methods.
- ***Escalante-Orozco*** at ¶¶ 45–47: Because police department's protocol guidelines permitted witness to use below-threshold allele for statistical purposes, witness's opinion was reliable.

- **702.d.010** A witness who is qualified as an expert may testify in the form of an opinion or otherwise if the expert has reliably applied the principles and methods to the facts of the case.
- ***Escalante-Orozco*** at ¶¶ 52–53, 60–61: Because witness properly applied guidelines from Scientific Working Group on DNA Analysis Methods, trial court did not abuse discretion in admitting witness's testimony, and although defense expert criticized identifying major contributor based on information at only one locus, jurors could decide whose opinion to credit).

- **403.cr.030** Evidence is "*unfairly* prejudicial" only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror.
- ***Escalante-Orozco*** at ¶¶ 48–50: Merely because Y–STR profile would be found in 1 in 34 southwestern Hispanics did not have effect of causing jurors make decision based on emotion, sympathy, or horror, and trial court did not abuse discretion in not precluding DNA expert from using words "included," "not excluded," and "match".

Rule 401. Definition of "Relevant Evidence." (Civil Cases.)

- ***Ryan ex rel. McDonald v. Napier & Klein,*** 243 Ariz. 277, 406 P.3d 330 (Ct. App. 2017): ***McDonald*** sued sheriff's department for injuries caused when **Klein** used K–9 to apprehend him; Defendants contended trial court abused its discretion in admitting testimony about United States Supreme Court case of *Graham v. Connor,* which set forth a three-part test for reasonableness in context of a Fourth Amendment excessive-force claim.
- **401.civ.010** For evidence to be relevant, it must satisfy two requirements: **First,** the fact to which the evidence relates must be of consequence to the determination of the action (materiality), and **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).
- ***Ryan*** at ¶¶ 27–34: Court held *Graham v. Connor* was relevant (1) to extent that it helped to set expectation of what is required or not allowed in use of force, such as through K–9 officer training, and (2) to help jurors understand basis for conclusions of two experts and of officer's supervisor about reasonableness of officer's actions.

Rule 404(b) — Other crimes, wrongs, or acts (Civil Cases).

- ***Stafford v. Burns,*** 241 Ariz. 474, 389 P.3d 76 (Ct. App. 2017): Plaintiffs brought claims for medical malpractice and wrongful death after their son died of methadone overdose; plaintiffs contended defendant negligently caused death by wrongfully determining son was stable and discharging him prematurely; plaintiffs objected to admission of evidence suggesting their son ingested additional methadone after his discharge that ultimately caused his death;
- **404.b.civ.240 Extrinsic** evidence of another crime, wrong, or act is relevant to show **knowledge**.
- **403.civ.010** Exclusion if danger of *unfair* prejudice *substantially* outweighs the probative value.
- ***Stafford*** at ¶¶ 31–33: Court held trial court did not abuse discretion in allowing evidence that postmortem urine sample contained metabolites concluding evidence was relevant to rebut testimony of plaintiffs' witnesses that son did not, or could not, or would not have sought out additional methadone after his discharge from emergency department).

Rule 702. Testimony by Expert Witnesses.

- Plaintiffs moved to preclude any expert testimony extrapolating timing of son's last methadone injection based on son's post-mortem gastric methadone levels, claiming this was based on "junk science," and contended trial court should have held pre-trial hearing on expert testimony.
- **702.008** The trial court has discretion whether to set a pre-trial hearing to evaluate proposed expert testimony and may properly decide to hear the evidence and objections during the trial.
- ***Stafford*** at ¶¶ 28–30: Court noted both parties presented lengthy and detailed pleadings, cited supporting literature, and attached affidavits containing specific opinions of their other disclosed medical and pharmacologal experts, and concluded trial court did not abuse discretion in not holding pre-trial hearing).

Rule 406. Habit; Routine Practice.

- ***Rasor v. Northwest Hosp. LLC,*** 239 Ariz. 546, 373 P.3d 563 (Ct. App. 2016), *vac'd in part,* 242 Ariz. 582, 399 P.3d 657 (2017) (vacating ¶¶ 17–23).
- Plaintiff contended ICU nurse provided deficient care in failing to take steps to minimize bed pressure and in failing to timely discover pressure ulcer, and sought disclosure of patient records of all ICU patients who had developed pressure ulcers in 4 years preceding plaintiff's injury.
- **406.010** Habit describes a person's regular or semi-automatic response to a repeated specific situation, while character refers to a generalized description of a person's disposition.
- *Rasor* at ¶¶ 29–36: Court held patient records could be relevant for discovery purposes based on plaintiff's contention that defendant's staff had habit or routine of not following hospital's repositioning procedures.

Rule 408. Compromise and Offers and Negotiations.

- **Rule 613. Witness's Prior Statement.**
- ***Phillips v. O'Neil,*** 243 Ariz. 299, 407 P.3d 71 (2017): **Brent Randall Phillips** agreed to consent judgment that he had violated the Arizona Consumer Fraud Act by mailing deceptive advertisements to Arizona consumers, by which he waived his right to a trial, admitted his actions violated the CFA and a federal regulation, and agreed to pay restitution, attorney fees, and civil penalties; State Bar wanted to introduce evidence of consent judgment in disciplinary proceedings pending against Phillips relating to same conduct.
- **408.010** Rule 408 precludes use of a consent judgment to prove substantive facts to establish liability for a subsequent claim.
- **613.080** Consent judgment may not be used for impeachment purposes under Rule 613.
- ***Phillips*** at ¶¶ 9–28: Court held State Bar was precluded from introducing evidence of consent judgment in disciplinary proceedings pending against Phillips relating to same conduct).

Rule 410. Pleas, Plea Discussions, and Related Statements.

- ***State v. Gill,*** 241 Ariz. 770, 391 P.3d 1193 (2017): After state reduced possession of marijuana charges to misdemeanor and defendant rejected plea offer, parties agreed defendant would participate in TASC; when defendant failed to complete TASC program, state proceeded with prosecution; defendant objected to admission of statements he made in "statement of facts" form.
- **410.070** A statement of fact form executed in order to participate in a TASC program, if not made within the context of a plea agreement discussion, is not a statement in connection with a plea agreement, and thus is not precluded by this rule.
- ***Gill*** at ¶¶ 9–14: Court held statements were admissible.

Rule 501. Requirements for a Privilege.

- ***State v. Peltz,*** 241 Ariz. 792, 391 P.3d 1215 (Ct. App. 2017): ***Peltz*** was a in hospital room with the door not completely closed and talking loud enough to be heard in hallway; the officer was in hallway waiting for the blood sample and completing his paperwork.
- **501.02.010** To be privileged, a communication must meet four criteria: (1) it originates in a confidence that the person making the communication believes will not be disclosed; (2) confidentiality is essential to the full maintenance of the relationship of the parties; (3) the relationship is one that the community believes should be fostered; and (4) the injury to the relationship that would occur from disclosure would be greater than the benefit gained by the aid given to the litigation.

- **us.a4.ss.xp.010** An individual must have a legitimate expectation of privacy in the searched area before that interest will be protected by the Fourth Amendment, determiner by two factors: **first,** whether the individual, by conduct, has exhibited an actual (subjective) expectation of privacy; **second,** whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.
- ***Peltz*** at ¶¶ 21–27: Court held defendant had no reasonable, objective expectation of privacy in his statements to medical personnel, and even if he had subjective expectation of privacy, it was not one that society would recognize as reasonable; court held this was true even in context of physician-patient privilege.

Rule 701. Opinion Testimony by Lay Witnesses.

- Officer saw blood on driver's side of vehicle (inside and outside of door, on seat, floorboard, and steering wheel), and no blood on passenger's side of vehicle; saw that defendant had cut above left eye that was bleeding and saw blood on defendant's hands; and saw no open cuts on passenger; Peltz asserted the trial court erred by admitting lay witness testimony from the officer "regarding who was driving based upon the blood spatter," arguing the officer could not give such testimony "unless he can prove he is an expert in blood spatter."
- **701.020** A witness who is not testifying as an expert may give testimony in the form of an opinion if the opinion is limited to one that is (a) rationally based on the witness's perception, (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
- ***Peltz*** at ¶¶ 12–19: Court held officer's opinion that defendant was driving was proper lay witness testimony and not expert testimony.

Rule 609(a)(2) — Impeachment with a misdemeanor conviction.

- ***State v. Winegardner,*** 2018 WL 1462113 (2018): **Winegardner** was charged with sexual conduct with his 15-year-old step-daughter in October 2012; he sought to impeach her testimony with evidence of her 2015 shoplifting conviction.

Rule 609. Impeachment by Evidence of a Criminal Conviction.

- **(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
- **(1)** for [any crime when punishment > 1 year], the evidence:
- **(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
- **(B)** must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
- **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

- **609.a.2.010** The phrase "dishonest act or false statement" should be construed narrowly to include only those crimes that involve deceit, untruthfulness, or falsification, thus a misdemeanor conviction is admissible only if the elements of the crime required proving, or the witness's admitting, some element of deceit, untruthfulness, or falsification.
- ***Winegardner*** at ¶¶ 6–17 Court held that elements of shoplifting do not necessarily involve deceit, untruthfulness, or falsification.

- **609.a.2.020** When the legal elements of an offense do not necessarily involve a dishonest act or false statement, the factual basis for the prior conviction may warrant admission of the conviction for impeachment purposes, in which case the party seeking admission of the prior conviction bears the burden of establishing the factual basis for its admission, which may come from such sources as the indictment, a statement of admitted facts, or jury instructions, but this rule does not permit a "trial within a trial" delving into the factual circumstances of the conviction by scouring the record or calling witnesses.
- ***Winegardner*** at ¶¶ 19–24: Because defendant provided trial court with no information showing shoplifting conviction involved dishonest act or false statement, trial court did not abuse its discretion in precluding evidence of shoplifting conviction.

Rule 615. Excluding Witnesses.

- ***Spring v. Bradford,*** 243 Ariz. 167, 403 P.3d 579 (2017): In a medical malpractice case, at start of trial, with both parties' agreement, the trial court ordered rule of exclusion of witnesses would be in effect; during trial, defendant's attorney provided his expert witnesses with transcripts of testimony by plaintiff's expert witnesses.
- **615.010** Exclusion of a witness is mandatory when requested in both civil and criminal cases, unless the party is able to show the witness's presence is essential to the presentation of the party's claim or defense.
- ***Spring*** at ¶ 13: Rule 615 requires trial court, when requested, to exclude witnesses so they cannot hear other witnesses' testimony.

- ***Nia v. Nia,*** 242 Ariz. 419, 396 P.3d 1099, ¶¶ 34–36 (Ct. App. 2017) (mother contended trial court's exclusion of her expert witness during father's testimony prejudiced her ability to present her case; on appeal, mother did not argue her expert witness on finances was "essential" to the presentation of her case, but instead her expert witness's presence may have been helpful if expert had opportunity to hear father's testimony so he could provide contradictory evidence; trial court noted expert was not necessary because parties had "ample time to do discovery" and "there's [not] another expert on the other side"; court held trial court's exclusion of expert from the courtroom was not abuse of discretion).

615.060 This rule does not automatically exempt an expert witness from exclusion.

- ***Spring*** at ¶¶ 15–16: Court rejected defendant's contention that an expert witness is always an "essential witness" and therefore not subject to exclusion, but concluded trial court's action of providing instructions to jurors was sufficient to correct any error.
- **615.070** Even though the trial court has invoked the rule excluding a witness, the trial court may allow an expert witness to review transcribed testimony in order to prepare to testify.
- ***Spring*** at ¶¶ 30–35: Trial court noted that, had counsel sought permission, it likely would have allowed both sides' experts to review or observe trial testimony).

- **615.080** A rebuttable presumption of prejudice applies only in those limited cases in which a witness's Rule 615 violation is substantial and makes proving the existence of prejudice nearly impossible; in all other cases, the moving party at least must prove that a witness's Rule 615 violation gave rise to an objective likelihood of prejudice.
- ***Spring*** at ¶¶ 17–29: Court concluded trial court's action of providing instructions to jurors was sufficient to correct any error).

Rule 801(c) — Hearsay.

- ***State v. Pandeli,*** 242 Ariz. 175, 394 P.3d 2 (2017): Dr. B. performed autopsy, and Dr. K. testified he formed his own opinion of cause of death based on autopsy report and photographic exhibits; autopsy report not admitted in evidence.
- **801.c.035** If an expert witness discloses the facts or data only for the limited purpose of disclosing the basis of the opinion, they are not substantive evidence and admission of those facts and data does not violate the right of confrontation, and because they are not admitted to prove the truth of the matter asserted, they are not hearsay.
- ***Pandeli*** at ¶¶ 46–51: Court noted it "has held that an autopsy report is nontestimonial when created to determine the manner and cause of death to aid in apprehending a suspect at large, rather than gathering evidence for prosecution of a known suspect."

Rule 703. Bases of an Expert's Opinion Testimony.

- ***State v. Smith,*** 242 Ariz. 98, 393 P.3d 159 (Ct. App. 2017): Technician K.L. conducted saliva tests on victim's underwear and submitted test results to analyst B.S., who testified at trial basing testimony in part on K.L.'s test results
- **703.110** Although an expert witness is allowed to disclose facts or data not admissible in evidence if they are of the type upon which experts reasonably rely, the expert should not be allowed to act merely as a conduit for the other expert's opinion and thus circumvent the requirements excluding certain types of hearsay statements.
- ***Smith*** 6–13: Because B.S. testified at trial, but had not done any independent analysis of test results, her testimony was hearsay and violated defendant's right of confrontation.

Rule 901(a) — Authentication and Identification.

- ***State v. Fell (Lietzau),*** 242 Ariz. 134, 393 P.3d 475 (Ct. App. 2017): For charge of sexual conduct with minor, state sought to introduce recordings purportedly between defendant and victim.
- **901.a.010** For the matter in question to be admissible in evidence, the proponent need only present sufficient evidence from which the trier-of-fact could conclude the matter in question is what the proponent claims it to be; whether the matter in question is in fact what the proponent claims and whether it is connected to the litigation is a question of weight and not admissibility, and is for the trier-of-fact.

- ***Lietzau*** at ¶¶ 4–15: Court noted (1) probation officer had claimed defendant told him messages were from victim; (2) messages were consistent with other evidence; (3) victim had admitted having a sexual relationship with defendant; (4) victim would testify about exchanged text messages between defendant and her; (5) recordings of jail calls showed defendant had asked family members to contact victim; (6) defendant had given phone to victim; (7) defendant referred to fact he had carved "[victim] is mine" on his arm; and (8) defendant had identified himself in one message; court held this was sufficient evidence for jurors to conclude recordings were between defendant and victim; fact that phone was not in defendant's name and other people had access to it went to weight and not admissibility.